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No. ———

IN THE

Supreme Court of the United States

October Term, 1987

CHARLES JIMENEZ-NETTLESHIP; FELIPE TORRES-TORREGROSA; JOSE CANDELARIA;

Petitioners,

v.

GUILLERMINA CORTES-QUIÑONES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Under *Estelle v. Gamble*, 429 U.S. 97 at 104-105 (1976), prison officials' *intentional* denial of medical care, or of access to such care for an inmate's serious illness or injury, is "deliberate indifference" in violation of the Eighth Amendment. The question presented is:

> Was it clearly established on September 30, 1981 that prison officials who unknowingly or inadvertently fail to provide psychiatric care to treat an inmate's chronic aggressive tendencies, act with "deliberate indifference" to an inmate's serious medical illness, and cannot avail themselves of the defense of qualified immunity?

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CHARLES JIMENEZ-NETTLESHIP; FELIPE TORRES-TORREGROSA; JOSE CANDELARIA;

Petitioners,

v.

GUILLERMINA CORTES-QUIÑONES;

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Charles Jiménez-Nettleship, Felipe Torres-Torregrosa, and José Candelaria very respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered March 28, 1988.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Exhibit B in the Appendix hereto. (App. 3-19) No opinion was rendered by the District Court for Puerto Rico.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on March 28, 1988. A timely petition for rehearing *en banc* was denied on April 22, 1988 (Exhibit A. App. 2) and this petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VIII to the Constitution of the U.S.:

> "Excessive bail shall not be required,
> nor excessive fines imposed, nor cruel
> and unusual punishments inflicted."

STATEMENT OF THE CASE

Plaintiff Guillermina Cortés-Quiñones (Cortés), respondent before this Court, brought this Sec. 1983 action against defendants-petitioners, correctional officials of the Puerto Rico prison system. Cortés claimed that the officials violated her son's Eighth Amendment rights when they failed to provide him with adequate medical care for his serious illness and when they failed to protect him from other inmates. Cortés also claimed that petitioners deprived her son of his life in violation of the Due Process clause of the Fourteenth Amendment. The son—William Arenas-Cortés (Arenas)—was in a large group of inmates who were transferred to the Arecibo District Jail (Arecibo) after a major disturbance at the State Penitentiary on the evening of September 30, 1981. Arenas was killed by other inmates at Arecibo more than three months after his transfer and just three days after he perpetrated a homosexual assault on two other inmates; an incident recorded

in the Arecibo prison logbook, which was admitted in evidence. Cortés' husband (Arenas' stepfather) also sued and asserted a claim for damages, but shortly before trial, the district court granted defendants' motion for judgment on the pleadings and dismissed the stepfather's claim. The parties before this Court are the same parties at the courts below.

Petitioner Jiménez was the head of the Puerto Rico prison system, comprising twenty institutions throughout the island. Petitioner Torres was the second-highest ranking official, in charge of providing security to all institutions within the system. Petitioner Candelaria was the superintendent of Arecibo on the night of Arenas' transfer on September 30, 1981. He left his post just 19 days after the transfer, on what turned out to be an extended sick leave. He was not working at Arecibo after October 19 or at the time of Arenas' death on January 8, 1982. Another official took over as "acting superintendent" after Candelaria's departure on October 19, 1981.

The facts of this case are not in dispute. Jiménez and Torres each assumed office just a few weeks before the evening of Arenas' transfer, at a time when the Puerto Rico prison system faced an unprecedented crisis brought on by two rival gangs of inmates engaged in a bloody gang war that began in late 1980. Before the officials by 1982 could bring under their control the murderous rivalry between "Monacillos" and "Manuel Pérez" inmates, the gang wars had exacted a heavy toll: throughout 1980-1982 more inmates were killed by other inmates at every single institution within the system than in all the years since each institution had been in operation.

The gang wars exacerbated long-standing unsafe prison conditions and other conditions that a federal court decree had earlier held violated inmates' Eighth Amendment rights: *Morales Feliciano v. Barceló*, 497 F. Supp. 14 (1979 DPR). Unconscionable overcrowding at every single institution, a

scarcity of custodial personnel and staff, and obsolete, deteriorated physical installations provided the stage for unrelenting inmates bent on killing their rivals. The "rule of silence" among inmates hampered the officials in their task of identifying the gang leaders ordering the executions of rival inmates.

Into this scenario walked Jiménez and Torres on July 17 and September 1, 1981, respectively. On the evening of September 30, 1981, they were summoned to the State Penitentiary to deal with a major disturbance; the latest episode in the inmates' ongoing warfare. The inmates had gone on a rampage lasting several hours. Several inmates were injured and a "Manuel Pérez" chieftain was killed by "Monacillos" inmates, after these gained access to a separate section of the State Penitentiary where Arenas was housed along with other "Manuel Pérez" inmates. The inmates demolished a concrete wall and security installations at the institution were seriously compromised by the inmates' vandalization.

After assessing the situation, Jiménez and Torres decided to close all but a section of the State Penitentiary and to transfer a large group of inmates to other institutions across the island. Arenas and fellow "Manuel Pérez" inmates were transferred to Arecibo because correctional officials had learned by that time that Arecibo's inmates had either cast their loyalties with the "Manuel Pérez" gang or had remained "neutral." Jiménez, Torres and correctional officials at the State Penitentiary worked throughout the ensuing evening hours to complete the transfers of State Penitentiary inmates to other institutions across the island.

In preparation for the transfers, Torres reviewed the inmates' files. In the process, he missed Arenas' sociopenal file documenting a diagnosis of "chronic schizophrenia undifferentiated" made by a psychiatrist in 1975 and a second

diagnosis made four months later by a psychologist who screened Arenas and noted that he had psychopathic "tendencies" and "possible" schizophrenia. Arenas' file also noted that he had undergone psychotherapy for this mental condition *while remaining in the general prison population*. Jiménez attended to myriad details related to his decision to close the State Penitentiary and did not review the inmates' files at all, delegating this task to Torres. Had Jiménez and Torres carefully read Arenas' prison files, they would have learned that Arenas' chronic psychiatric condition specifically consisted of his chronic aggressive tendencies, his conflict with authority figures and psychopathic (sociopathic) tendencies associated with antisocial behavior.

Arenas' prison records were admitted in evidence and they document this chronic psychiatric condition; one that did not render him mentally insane or in need of constant attention and care in order to attend to his daily needs. Arenas was allowed to remain in the general prison population after these diagnoses and his prison files show that over a period of years, he underwent psychotherapy "to better his attitudes." His prison files show no history of past transfers in segregation as a measure indicated to protect him from other inmates, or to keep him from endangering his life, or to insure the safety of other inmates and staff.

Arenas' aggressiveness and conflict with authority figures dated from his childhood years. He spent these years with his mother in New York, where his stepfather was employed as a building superintendent. While attending school in New York, Arenas was suspended from school several times on account of his aggressive behavior. After Arenas hit a teacher at school, child welfare authorities arranged for his screening and evaluation at Rockland Hospital; a state psychiatric facility in New York. Arenas' problems were diagnosed at Rock-

land as "childhood schizophrenia." He was 10 years old at the time of this diagnosis in 1964.

For the next seven years Arenas received "on-and-off" treatment at Rockland as a voluntary patient. At one time he was treated with antipsychotic drugs. By the time of his discharge from Rockland in 1971 after seven years of treatment, his Rockland record noted that he remained free of psychotic symptoms and had obtained the maximum benefits of treatment at this institution. His behavior posed a problem even while undergoing treatment. He had a history of escapes from Rockland. Once he hit a counselor over the head with a baseball bat. On another occasion, he was caught ransacking people's mailboxes at the building managed by his stepfather. These and other events were documented in his Rockland record; a record kept in the course of business at Rockland, at a time when there was no relationship between Arenas and the Puerto Rico correctional system. This record was procured by Cortés' counsel directly from Rockland and was admitted in evidence over defendants' objections.

In 1971 Arenas was discharged from Rockland. His mental problem at the time of his discharge was diagnosed as "Adjustment Reaction to Adult Life." His Rockland record noted that further psychotherapy was recommended in order to better his control over his aggressiveness and poor tolerance for frustrations, and in order to develop his "immature insight." The family returned to Puerto Rico in 1971 when Arenas was 17 years old.

Two years later, Arenas first entered the Puerto Rico correctional system after his first convictions for attempted rape, robbery and weapons law violations. Since he was not yet 21 years old, he was remanded to the Miramar Institution for Young Adults to serve a three-year sentence. It was at this institution that Arenas was screened in 1975 and diagnosed first as a "chronic undifferentiated schizophrenic," and a few

weeks later as a "possible" schizophrenic with sociopathic tendencies. These diagnoses were noted in Arenas' sociopenal file. It does not appear from Arenas' file that Arenas ever told those who screened him, or any other official at Miramar, of his past treatment for "childhood schizophrenia" at Rockland. By the time of these diagnoses Arenas had become addicted to LSD and heroin and exhibited bizarre behavior. Arenas' psychological evaluation also noted that he was of superior intelligence.

Had petitioners carefully read Arenas' files, they would have learned that no psychiatrist, psychologist, or any sociopenal worker assigned to Arenas' case had ever noted in Arenas' files that Arenas' chronic mental problems warranted his segregation from the general prison population because his chronic aggressive tendencies posed a serious security risk to himself, to other inmates, or to prison staff. Arenas' prison files, documenting his eight-year history of incarceration before his transfer to Arecibo, show that he was allowed to remain in the general prison population while undergoing psychotherapy "to better his attitudes."

Arenas served his first sentences at Miramar and was released in 1976. A few months later, he was arraigned on first-degree murder charges after he killed a state police officer while in possession of a stolen firearm. He was 22 years old at the time. At this time, Arenas' defense attorney entertained the possibility of an insanity plea based on Arenas' past record of treatment at Rockland for his "childhood schizophrenia." The judge handling the case allowed time for Arenas' attorney to obtain the Rockland psychiatric record from New York.

After the Rockland record arrived in Puerto Rico, the judge ordered Arenas' psychiatric screening and psychometric evaluation at the hands of two psychiatrists on the staff of Puerto Rico's state psychiatric institution; an institution then and now under the jurisdiction of the state Department of

Health, inasmuch as the Corrections Administration has never operated a facility for the psychiatric treatment of its inmates. The judge ordered the delivery of the Rockland record into the hands of the Medical Director of the state psychiatric hospital, to be used by the psychiatrists who were to screen and evaluate Arenas.

Arenas was screened by two psychiatrists and was found mentally competent to stand trial. He was tried, convicted and sentenced in 1977—as a repeat offender—to, among others, a life-term for the murder of the state police officer. This is the sentence which Arenas was serving on the evening that petitioners Jiménez and Torres decided to transfer him to Arecibo after the major disturbance at the State Penitentiary. He was serving this sentence in "medium security" custodial classification in the general prison population.

By the time of his transfer to Arecibo, Arenas had been housed at four different penal institutions, all of them which the *Morales Feliciano* court had found unconscionably overcrowded, unsafe and substandard in every way. By May 3, 1979, a clinical psychologist who evaluated Arenas noted in his sociopenal file that Arenas was "evasive, with narcissistic behavior.... [H]e presents conflict with authority figures and his motivations for achievements and future social orientation are inadequate.... [H]is tendency towards aggression as a means to obtain an objective is part of his pattern of behavior." A later entry in Arenas' sociopenal file noted that he continued psychotherapy with the psychologist and that he was a drug addict undergoing treatment with the drug abuse unit.

Arenas remained in the general prison population in "medium security" custodial classification while undergoing psychotherapy and drug abuse treatment. His prison files do not show that either medical personnel, or any person periodically evaluating his case ever made a recommendation that Arenas be segregated from the general prison population on

account of his chronic aggressive tendencies. There was no evidence at trial that Arenas had been segregated in the past because he had attacked another inmate or because he himself had been attacked by fellow inmates, nor is there evidence on record that he had ever perpetrated a homosexual assault on another inmate before January 5, 1982.

It is uncontested that Jiménez and Torres never learned of Arenas' chronic psychiatric problems and that they never saw or met Arenas. All three petitioners admitted that they knew of markedly unsafe prison conditions at every institution including Arecibo, on account of the rival inmates' gang wars. Arecibo was an institution where psychiatric treatment was unavailable and lacked in-house facilities for the psychiatric screening of inmates. Petitioner Candelaria, as superintendent of Arecibo on the evening of Arenas' arrival, met with Arenas on that evening. Candelaria testified without contradiction that Arenas' demeanor and behavior did not lead him to think that Arenas was mentally ill and that, therefore, it did not occur to him that he had to segregate Arenas from the general prison population in order to comply with that portion of the *Morales Feliciano* decree relating to "severely mentally ill" inmates.

It is also uncontested that Candelaria, as prison superintendent, had the power to order segregation as a security measure to protect an inmate (protective custody). He testified without contradiction that segregation in protective custody was available upon request to any inmate who felt threatened or feared for his safety. It was Candelaria's uncontroverted testimony that, before he left on sick leave on October 19, Arenas had neither requested segregation in protective custody nor requested a transfer to another institution.

The Arecibo prison logbook was admitted in evidence and it showed that Arenas requested a change in living accommodations on the night of October 16, when he reported, without further elaboration, that he "had problems" at his

assigned dormitory. The logbook shows this request was promptly granted. A custody guard on October 24 noted in the logbook that Arenas was feeling sick and "seemed afraid." Arenas had been fitted with a "Foley" catheter the previous day (October 23). The sergeant of the custody guards ordered that Arenas be placed in another dormitory while he recuperated; and the sergeant's orders were promptly followed.

While the Arecibo logbook recorded the deaths of three inmates killed by other inmates from October 8 to December 14, 1981, none of the entries in the logbook from the date of Arenas' arrival and until January 5, 1982, implicated Arenas as either the perpetrator or the recipient of the violent acts occurring at Arecibo at the time. Arenas' prison files also show that while the gang wars raged on and Arenas was being housed at the Ponce District Jail in February 1981, Arenas had requested a transfer to another institution after reporting that he had made enemies among the inmates at Ponce. Arenas' files show that this request was granted, and this is how he came to be housed at the State Penitentiary by the evening of his transfer to Arecibo.

A general practitioner on contract to provide services at inmates' sick calls at Arecibo, saw Arenas on 7 different occasions from October 8 to November 25, 1981 while treating him for a urinary tract infection. At trial, upon being shown for the first time Arenas' Rockland psychiatric record documenting a phase in Arenas' childhood treatment when he had been treated with antipsychotic drugs, this general practitioner was asked whether a schizophrenic on antipsychotic drugs should be in the general prison population; and he replied that such a person should not be in the general prison population.

This same prison doctor testified that Arenas' behavior always appeared normal and did not lead him to suspect that Arenas had once been diagnosed as a schizophrenic. This prison doctor corroborated Candelaria's testimony that Arenas

did not seem mentally ill at all while he was incarcerated at Arecibo.

It is an uncontested fact that Arenas' prison files became available to Candelaria at Arecibo after October 5, and remained available to him throughout October 19 before he departed on sick leave. It is uncontested that, during those 14 days, Candelaria neither reviewed Arenas' file nor the files of any of the 39 other transferees. However, Candelaria reviewed the files of 59 inmates already housed at Arecibo whose cases came up for review before the classification and treatment committee before he went on sick leave on October 19. He testified that there were only two sociopenal workers assigned to Arecibo at the time, in charge of preparing for his review the cases of more than 200 inmates already housed at Arecibo before Arenas' group arrived in transfer. The correctional regulations do not assign priority handling to the cases of transferees over the cases of inmates already housed at an institution.

It is uncontested that neither Jiménez nor Torres were ever contacted by Candelaria, nor by Candelaria's successor in office after October 19, to deal with any matter related to Arenas' need or request for segregation, or his need or request for a transfer to another institution, as security measures intended to protect Arenas or to protect others from Arenas. It is uncontested that while the Arecibo logbook recorded at the time several other inmates' requests for segregation, there are no entries in the logbook recording Arenas' similar requests for segregation or for a transfer to another institution.

An entry in the Arecibo logbook shows that on January 5, 1982—more than three months after Arenas' transfer to Arecibo—Arenas perpetrated a violent homosexual assault on two other inmates who reported the assault to a custody officer on duty, but who nevertheless declined to press charges against Arenas for fear of reprisals. Candelaria had left his post on

October 19 and was not holding office at Arecibo at the time of this incident. There is no evidence on record that the official who substituted for Candelaria at Arecibo after October 19, informed Jiménez or Torres of this incident. Three days after this incident—on January 8, 1982—Arenas was killed by other inmates. Later that same year, Arenas' killers were identified, tried, convicted and sentenced to life-terms for Arenas' murder. The inmates who had killed Arenas were Arenas' fellow "Manuel Pérez" inmates; the same inmates who had been housed together with Arenas at the State Penitentiary during 1981 and who had been transferred to Arecibo together with Arenas on the evening of September 30, 1981.

Just three weeks before his death, Arenas wrote a letter to Jiménez requesting his permission to marry. This letter was admitted in evidence as part of Arenas' files. In this letter to the head of the prison system, Arenas made no reference whatsoever to the violence occurring at Arecibo at the time. He never informed Jiménez in this letter that he was afraid or felt at risk at Arecibo, or that he wanted to be placed in segregation for his protection, much less that he wanted a transfer to another institution because he feared for his life at Arecibo. Arenas' letter to Jiménez did not mention that he desired a transfer elsewhere to receive psychiatric treatment or other medical care unavailable at Arecibo.

A. *Disposition of the case at the district court:*

Defendants-petitioners moved for summary judgment on claims of qualified immunity, asserting there was no issue as to any material fact and averring that they had acted in good faith when they transferred Arenas to another institution where they deemed that he would not be at risk of violence at the hands of "Monacillos" inmates. The district court denied their motions, holding that Arenas' Eighth Amendment rights to adequate

protection and medical care were clearly established at the time. The jury was instructed that this case involved a claim that defendants "knew or should have known" that Arenas was a "known" schizophrenic and that they failed to properly classify and treat him as such, that Arenas' mental condition was one "for which he was not responsible," and that Arenas should not have been "incarcerated with the general prison population."

The jury was also instructed that this case involved a claim for deprivation of life without due process of law on account of "the particular circumstances in which [Arenas] was incarcerated." The judge instructed the jury that "Section 1983 is not designed to apply to merely negligent conduct but instead, to 'deliberate' conduct or decisions."

The jury was also instructed that this case involved a claim for inadequate regard for Arenas' safety and that "at some point in time inadequate regard for safety, disregard for the safety of prisoners will rise to the level of a constitutional violation and ... [m]ay be equivalent to deliberate actionable conduct." The jury was instructed that in order to determine whether defendants had acted with "deliberate indifference" to Arenas, the jury could consider whether defendants had disregarded their *Morales Feliciano* duties to correct unconstitutional prison conditions and—specifically—their duty to provide constant attention and medical care to "psychotic or severely mentally ill" inmates. The jury was instructed that it could consider whether the evidence showed that there were established procedures for the psychiatric screening of the entire inmate population and for the delivery of psychiatric care to "emotionally and mentally disturbed inmates," as ordered by *Morales Feliciano*.

The jury was also instructed that an "act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reasons." It was in-

structed that, in order to determine whether defendants had acted with "deliberate indifference," the jury could consider whether defendants "had knowledge or should have known" of aggravated conditions creating a pervasive risk of harm to inmates—specifically—"whether mentally sick inmates were exposed to risks in the general population of a jail." Defendants did not object to these instructions and the jury found against all defendants.

B. *The opinion and judgment of the Court of Appeals:*

The decision below affirmed the jury's findings on "deliberate indifference" based on the evidence on record that defendants omitted to carefully read Arenas' files and learn of Arenas' psychiatric problems and of his alleged need to be segregated at Arecibo; an euphemistically unsafe prison where Arenas' mental problems, according to the decision below, played "an incendiary role." The decision below held that the jury could have found or inferred that Arenas' mental illness was "severe" and that defendants incurred in serious omissions when they failed to either segregate him or expedite his psychiatric screening. On the crucial question of causation, the decision below held, without further elaboration, that "the circumstances of Arenas' death [were] consistent with his mental problems playing an incendiary role"; wherefore, had petitioners segregated him from "mentally sound prisoners" he is unlikely to have been killed. (There is no evidence on record that the inmates who killed Arenas, or that other inmates at Arecibo, had been psychiatrically screened and found "mentally sound".)

REASONS FOR GRANTING THE PETITION

I

The decision below conflicts with the decision of this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976):

Without precedent in the decisions of this Court or in those of other circuits, and refusing to follow its own earlier precedents, the decision below has carved out an exception from the *Estelle* rule to deny defendants' claims of qualified immunity, on the theory that their knowledge of unsafe prison conditions, combined with their knowledge of a *Morales Feliciano* duty to psychiatrically screen "psychologically disturbed prisoners such as Arenas," placed them on the equivalent of "actual notice" that Arenas was exposed to a pervasive risk of violence at Arecibo and had to be segregated from the general prison population. The decision below reached this result, in a case where the undisputed evidence on record is that none of the petitioners ever learned that Arenas had a history of aggressive tendencies, or that he had been treated for "childhood schizophrenia" before he entered the prison system.

The instant case involved both a claim for failure to adequately classify and treat Arenas as a "known" schizophrenic and another, different claim for failure to provide Arenas with adequate protection in the context of the pervasive risk of harm generated by the inmates' violence at an institution seriously deficient and earlier held to violate inmates' Eighth Amendment rights. The appellate court below refused to follow the *Estelle* precedent and its own earlier precedent in *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981), when it held petitioners liable for their "deliberate indifference" to Arenas' "mental health needs," even though *Estelle* and other decisions require intentional denial of medical care or intentional

denial of access to medical care. 429 U.S. 97 at 104-105. The First Circuit's own precedent in *Layne* did not attach liability to the head of a prison system who was not on notice that the inmate's illness was not being adequately treated. Assuming *in arguendo* that an inmate in need of psychotherapy to better his control over his chronic aggressive tendencies is an inmate suffering from a "serious illness" under *Estelle*, petitioners would not be liable for "deliberate indifference" to Arenas' "mental health needs," unless they knew of this need and intentionally denied him access to psychiatric treatment. *Estelle* 429 U.S. 97 at 104-105.

For purposes of petitioners' claims of qualified immunity, it was not clearly established at the relevant time that the *Estelle* rule excludes prison officials who are not on notice of an inmate's need for psychiatric treatment "to better his attitudes." Additionally, the decision below seems to have overlooked that the *Morales Feliciano* decree ordering the psychiatric screening of every inmate was specifically addressed to the Medical Director to be appointed at the Corrections Administration, who was ordered by the decree to devise adequate procedures for the psychiatric screening of the entire inmate population and for the delivery of mental health care to inmates found in need of such care. (Exhibit C, App. 19-24) The evidence on record is that at the relevant time, a Medical Director had already been appointed in compliance with this portion of the *Morales Feliciano* decree. This Medical Director was not sued in this action; yet the decision below found that Jiménez—as head of the prison system—was liable for his failure to have devised the court-ordered procedures to psychiatrically screen all inmates and to provide psychiatric care to those who needed it. Jiménez's liability, predicated on his failure to comply with the duties that *Morales Feliciano* assigned to the Medical Director, is "respondeat superior" liability, untenable in Sec. 1983 actions.

II

The decision below conflicts with the decision of the Fourth Circuit in *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied* 449 U.S. 849 (1980), because *Withers* attaches liability only when the risk is a foreseeable one:

The instant case involved a separate claim for failure to adequately protect Arenas from an aggravated risk of violence. The jury was instructed under *Withers v. Levine*, *ante*, that prison officials are "deliberately indifferent" to an inmate's safety needs when they know "or should have known" that aggravated prison conditions pose a pervasive risk of harm to the inmates and they fail to take adequate measures. The *Withers* test, however, articulates a norm of negligence; and as such, can only apply to a foreseeable risk, not to an unknown or unforeseeable risk.

The undisputed evidence on record is that the inmates' unprecedented violence presented petitioners with a serious crisis that remained a condition beyond their control at the time. However, it is also undisputed that, notwithstanding this crisis, petitioners were still able to provide inmates with two measures intended to safeguard their personal safety: segregation in protective custody and a transfer to another institution. The undisputed evidence on record is that Arenas never requested these measures, and that he knew that these measures were available, because he had earlier availed himself of a transfer to the State Penitentiary during the gang wars, when he had reported that he had enemies among the prison population at the Ponce District Jail. It is undisputed that Arenas never told Candelaria, Candelaria's successor, Jiménez, Torres, a custody guard or any other person at Arecibo, that he wanted to be segregated in protective custody or that he desired a transfer to another institution.

While petitioners concede that overcrowded and seriously deficient institutions during the duration of the gang wars created a pervasive risk of violence for inmates in general, there is no evidence on record to charge them with knowledge that Arenas, in particular, was at risk of death and should have been segregated in order to protect him from other inmates at Arecibo. Arenas' prison files do not show a history of past transfers in segregation as a measure indicated to adequately protect him from other inmates, or to protect other inmates or staff from his chronic aggressive tendencies. Accordingly, even the most careful reading of Arenas' records would not have placed petitioners on notice that they had to segregate Arenas at Arecibo on account of his mental problems. Under *Withers*, petitioners would not be liable unless they could foresee that Arenas, in particular, was at risk and needed segregation to protect him from other inmates. That Arenas would be killed by those same inmates with whom he had been housed at the State Penitentiary the year before, and with whom he had been transferred as a group to Arecibo on September 30, 1981, was not a foreseeable risk.

Assuming—*in arguendo*—that petitioners incurred in negligence when they failed to carefully review Arenas' prison files, liability still would not attach, unless their omissions were shown to have been a cause in fact of Arenas' death. The undisputed evidence on record is that the unprecedented violence generated by the inmates was a condition beyond the control of petitioners at the time. The existence of a pervasive risk of harm at Arecibo would not be enough even if petitioners were negligent, because as the Seventh Circuit has ruled, cause in fact must still be shown: *Kish v. County of Milwaukee*, 441 F.2d 901 (7th Cir. 1977). In this other respect, the decision below failed to follow its own earlier precedent in *Pinto v. Nettleship*, 737 F.2d 130, 132 (1st Cir. 1984), holding that prison officials are not liable for prison conditions beyond

their control.

The results reached by the court below seem unduly harsh, considering the particular two facts that: (1) petitioners were acting to protect Arenas from "Monacillos" inmates at the State Penitentiary when they decided to transfer him to Arecibo, and (2) that Arenas himself, through his own wrongful homosexual assault on another, aggravated his risk of violence at Arecibo. *Withers* cannot be "clearly established law" for the unlikely proposition that, when prison conditions are markedly unsafe, prison officials are liable for their failure to protect an inmate from an unknown or unforeseeable risk of harm. Under *Withers*, the risk must still be a foreseeable one.

Additionally, petitioners very respectfully submit that from the standpoint of sound policy considerations, this Court should not uphold the decision below. Prison officials already working for constructive changes in a seriously deficient system, should not be burdened by a precedent that translates into the novel proposition that an inmate whose own wrongful conduct exacerbates the violence at an institution, stands to be rewarded by a heightened duty of care on the part of the prison officials who must indemnify him, when they are unable to protect him from an unforeseeable risk of harm.

III

> The precise contours of the law in this area of litigation are unsettled and lower courts stand to benefit from this Court's authoritative voice on important issues likely to recur in prisons everywhere across the nation:

The precise contours of the law in this area of litigation are still unsettled. Section 1983 has become a favorite vehicle

for the litigation of inmates' claims, and issues such as the ones involved in this case transcend the particular problem of the inmates' gang wars confronted at the time by the administrators of the Puerto Rico prison system. Prison officials arguably do not have the choice of turning away legally sane inmates with chronic aggressive tendencies and antisocial attitudes. The issues involved in this case are likely to recur in the context of prisons everywhere across the nation—particularly in those prison systems whose "corporate fault" has earlier been addressed by a federal court decree—and a later lawsuit seeks to inquire into the degree of culpability of individual defendants and their causal role in the harm suffered by the inmate who sues them. *See: e. gr. Williams v. Bennett*, 689 F.2d 1370 at 1383 (11th Cir. 1982). Lower courts would stand to benefit from this Court's authoritative voice in an area of litigation frequently raising difficult and unsettled questions of law concerning supervisory liability in the context of non-conduct, rather than intentional conduct and, particularly, causation.

The facts of this case are not in dispute. The issues presented are of a recurring nature; and the manner in which several courts have applied the constitutional principles to slightly different but frequently occurring factual situations is illustrative of the importance of these questions and the lower courts' need for guidance from this Court. The results reached by the court below not only undermine important policy considerations behind the doctrine of qualified immunity, but, additionally, deal a mortal blow to prison officials' discretion when acting on the basis of their informed judgment in order to protect an inmate from a foreseeable risk of harm. No other court has come close to implying that when aggravated prison conditions are beyond the officials' control, prison officials become the insurers of inmates' risks unknown and unforeseeable.

Likewise, no other court has ruled that prison officials are under an Eighth Amendment duty to provide psychiatric care to treat an inmate's chronic aggressive and antisocial tendencies. Rehabilitation, for unwilling inmates, may arguably remain an elusive proposition. Retribution and deterrence serve legitimate penological purposes for inmates who have demonstrated a proclivity for antisocial, criminal and violent conduct, and who have shown an inability to conform their conduct to the laws of society and the rights of others. In any event, the *inadvertent* failure to treat an inmate's chronic aggressive tendencies cannot be characterized as "obduracy and wantonness" in violation of the Eighth Amendment.

CONCLUSION

The results reached by the First Circuit in the decision below are unsupported by current "clearly established" precedent. Under *Estelle v. Gamble*, *ante*, prison officials are not "deliberately indifferent" unless they *intentionally* deny medical care, or access to that care for an inmate's "serious illness or injury." None of the petitioners knew of Arenas' chronic psychological problems, and neither the superintendent nor any other official of the State Penitentiary working with petitioners on the evening of Arenas' transfer alerted them to Arenas' past psychotherapy treatment. The superintendent of the State Penitentiary was also under a *Morales Feliciano* duty to segregate "severely mentally ill" inmates at his institution. Arenas was *in the general prison population* at the time of his transfer to Arecibo, and petitioners were entitled to assume, at least initially, that Arenas could be transferred to Arecibo in the general prison population. Under *Withers v. Levine*, *ante*, prison officials' negligent acts and omissions may rise to the level of constitutional violations when inmates face a pervasive risk of violence and the officials fail to take adequate measures to protect them; however, the risk must still be a

foreseeable one. And their negligent acts or omissions must still be shown to have been a cause in fact of the inmate's harm before their liability attaches. If the petitioners are correct in urging that they could avail themselves of the defense of qualified immunity, this Court should grant this petition and reverse the decision below.

Very Respectfully Submitted.

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JUNE 1, 1988

APPENDIX

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EXHIBIT A
APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-2027

GUILLERMINA CORTES QUINONES, ET AL.,
Plaintiffs, Appellees,
v.
CHARLES JIMENEZ NETTLESHIP, ETC., ET AL.,
Defendants, Appellants.

No. 86-2106

GUILLERMINA CORTES QUINONES, ET AL.,
Plaintiffs, Appellees,
v.
CHARLES JIMENEZ NETTLESHIP, ETC., ET AL.,
Defendants, Appellants.

Before
Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella and Selya, *Circuit Judges*.

ORDER OF COURT
Entered: April 22, 1988

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing *en banc* having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court *en banc*,

It is ordered that the petition for rehearing and suggestion for rehearing *en banc* be, and the same are hereby, denied.

By the Court:
Francis P. Scigliano
Clerk.

EXHIBIT B
APPENDIX 3-19

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-2027
No. 86-2106

GUILLERMINA CORTES QUINONES, ET AL.,
Plaintiff, Appellee,
v.
CHARLES JIMENEZ NETTLESHIP, ETC., ET AL.,
Defendants, Appellants.

JUDGMENT

ENTERED: MARCH 28, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in respect to liability but vacated in respect to damages and attorney's fees and the cause is remanded to the district court for further proceedings consistent with the opinion filed this day.

Costs to appellees.

By the Court:
Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-2027
No. 86-2106

GUILLERMINA CORTES-QUINONES,
Plaintiff, Appellee,
v.
CHARLES JIMENEZ-NETTLESHIP, ETC., ET AL.,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jose Antonio Fuste, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,

Bownes and Breyer, *Circuit Judges*.

Vannessa Ramirez, Assistant Solicitor General, Department of Justice, with whom *Rafael Ortiz Carrion*, Solicitor General, and *Norma Cotti Cruz*, Deputy Solicitor General, were on brief for appellants.

Jose E. Fernandez-Sein with whom *Law Offices of Nachman & Fernandez-Sein* was on brief for appellee.

MARCH 28, 1988

BREYER, *Circuit Judge*. On September 30, 1981, Puerto Rico prison officials transferred William Arenas Cortés, a psychiatrically disturbed prisoner, and thirty-nine other prisoners, from the State Penitentiary to the Arecibo District Jail, a jail so overcrowded that space per prisoner amounted to 15.5 square feet (*e.g.*, 30 by 74 *inches*). Within a matter of a few months, Arenas was found dead, his body dismembered. His mother brought this civil rights action, 42 U.S.C. § 1983 (1982), against three prison officials, claiming that their actions amounted to "cruel and unusual" punishment of her son in violation of the Eighth Amendment. After various preliminary proceedings, *see Quiñones v. Nettleship*, 773 F.2d 10 (1st Cir. 1985), a jury returned a verdict in her favor in the sum of $247,000. The court awarded her attorneys $82,000 in fees and costs. The three defendants appeal these awards. In respect to the main issues that concern liability, we find no legal error. Other, subsidiary aspects of the case, however, will require further proceedings.

I.

The basic legal standards governing this case are well established. "[P]rison officials have a duty under the 8th and 14th amendments to protect prisoners from violence at the hands of other prisoners." *Leonardo v. Moran*, 611 F.2d 397, 398-99 (1st Cir. 1979); *accord Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Zatler v. Wainwright*, 802 F.2d 397, 400 (11th Cir. 1986); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984); *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974); *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973). Those amendments also impose a duty to attend to prisoners' "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *accord Layne v. Vinzant*, 657 F.2d 468, 474 (1st Cir. 1981); *Westlake v. Lucas*, 537 F.2d 857, 860 & n. 5 (6th Cir.

1976); *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974). When prison officials intentionally place prisoners in dangerous surroundings, when they intentionally ignore prisoners' serious medical needs, or when they are "deliberately indifferent" either to prisoners' health or safety, they violate the Constitution. *See*, *e.g.*, *Layne*, *supra*. Different courts have described "deliberate indifference" in various ways, but, at least, that term encompasses acts or omissions so dangerous (in respect to health or safety) that a defendant's "knowledge of [a large] . . . risk can be inferred." *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985); *compare Estelle*, 429 U.S. at 104 (inaction amounts to "deliberate indifference" if it constitutes " 'wanton infliction of pain' " (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))) *with Martin*, 742 F.2d at 474 (equating "deliberate indifference" with "reckless disregard") *and Layne*, 657 F.2d at 474 (same). The first legal question before us is whether the record evidence is sufficient to permit a jury to find "deliberate indifference."

Defendants concede that conditions in Puerto Rico prisons in 1980-82 were appallingly bad, with severe overcrowding (a system-wide average of twenty square feet per prisoner), squalor, maltreatment, gang warfare, killings, lack of proper medical care, failure to segregate mentally disturbed prisoners, guards unable to control entire cellblocks, and other horrors catalogued in a federal district court order that found the entire system in violation of the Eighth Amendment and ordered sweeping and dramatic changes. *Morales Feliciano v. Romero Barceló*, 497 F. Supp. 14 (D.P.R. 1979). Defendants add, however, that they were doing their best to cope with a near impossible situation, and that plaintiff should concede (and we agree) that their decision in September 1981 to transfer 40 prisoners from the State Penitentiary to Arecibo was reasonable in light of the fact that rioting State Penitentiary prisoners had broken through a concrete prison wall, forcing

officials to close a section of that prison. Defendants Torres and Nettleship also point out that they had been in office only a few months by September 1981. Where, they ask, is the evidence that each of them, as individuals, was "deliberately indifferent" to Arenas' health or safety problems, except perhaps in respect to matters beyond their control? *See Pinto v. Nettleship*, 737 F.2d 130, 132, (1st Cir. 1984) (no § 1983 liability for actions beyond a defendant's control).

Our review of the record convinces us that, even if we accept much of what defendants say, the jury still could find facts sufficient to warrant its finding of "deliberate indifference." Those facts consist of the following:

1. Arenas suffered from serious psychiatric problems. He had been diagnosed in the 1960s as a "childhood schizophrenic." In 1975, a psychiatrist wrote that "this inmate is suffering from chronic schizophrenia undifferentiated." An April 1975 prison system memo stated that Arenas needed "treatment with a psychiatrist or a psychologist." In June 1975, a prison psychologist wrote that Arenas showed "evidence of psychopathic tendencies, with possible conditions of schizophrenia" and that he warranted "pschotherapy treatment." The jury reasonably could have believed that this (or like) information was (or most certainly should have been) in Arenas's prison files.

2. Defendant Torres is Puerto Rico's Director of Penal Institutions, with special responsibility for prison security. Defendant Nettleship is Puerto Rico's Corrections Administrator. On the night of the prisoner transfers, Nettleship and Torres were at the State Penitentiary. Torres read all 40 prisoners' files and decided on the transfer. Nettleship reviewed that decision and approved the transfer order. The jury thus could have found that they knew or certainly should have known of Arenas's psychological problems.

3. Defendant Candelaria was the Superintendent of the

Arecibo District Jail. On the night of the transfer, he was at the prison and screened each of the transferees for medical and psychological problems. Although he conceded that he was not trained to conduct psychiatric evaluations, he testified that "when one looks at a person one can appreciate whether or not that person needs immediate treatment." Because the transfer was under emergency conditions, the prisoners' records did not follow until five days after the transfer. When they did arrive, Candelaria, who was chairman of the treatment and classification committee, did not review them. Instead, he sent the socio-penal records to the two social penal workers and sent the medical records to the medical staff for evaluation (an evaluation not yet made at the time of Arenas's death).

4. After being shown Arenas's psychiatric records for the first time at trial, the prison doctor testified that Arenas should never have been in the general prison population. Defendants should have segregated Arenas from those prisoners without mental problems. *See Morales-Feliciano*, 497 F. Supp. at 37-40 (ordering that prison officials segregate and provide treatment for all "psychotics" and "severely mentally ill" inmates).

5. Arenas was not segregated. Instead, he was placed with 245 other inmates in a jail that, at the 35 square feet per prisoner minimum established by the *Morales-Feliciano* order, 497 F. Supp. at 38-39, could house only 109. (The Joint Committee on Accreditation, whose standards serve as a guide for the federal Bureau of Prisons, requires 60 square feet per single or double celled prisoner, and 75 square feet per dormitory prisoner.) Psychiatric treatment was nonexistent at Arecibo, and conditions were chaotic and violent, with the transferees, predominately members of the "Manuel Pérez" prison gang, vowing to take over the jail from members of the rival Monacillo gang and to kill those who stood in their way. Arenas remained in that jail, unsegregated and without treat-

ment for his psychological problems, for nearly four months until he was killed. During that time, Arenas's case never came before the prison classification and treatment committee, although Candelaria testified that it would have come up in "due time."

6. Had any of the defendants acted to segregate Arenas from mentally sound prisoners at Arecibo jail, he is unlikely to have been killed.

We believe that, given these facts, the jury could have found defendant Torres "deliberately indifferent" to Arenas's health and safety. The trial judge instructed the jury that "aggravated conditions" coupled with an official's failure to act could constitute "deliberate . . . indifference in the sense that the official had knowledge or should have known of a pervasive risk of harm to inmates." *See, e.g., Withers v. Levine*, 615 F.2d 158, 161 (4th Cir. 1980) (prison officials liable for injuries to inmate where there was a " 'pervasive risk of harm to inmates from other prisoners' " and officials failed to respond reasonably to that risk (quoting *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973)). The judge further instructed the jury that, in determining whether this standard had been met, it could consider "whether the system of classifying inmates was adequate or inadequate, whether *mentally sick inmates were exposed to risks in the general population of a jail*, whether there existed a known history of attacks and murders, . . . and whether there was a serious breakdown of authority and control." (Emphasis added.) Torres knew of the terrible health and security problems at Arecibo. The jury could have inferred that he knew that sending a severely disturbed inmate to Arecibo, along with the others, invited especially serious trouble, including violence and death. For one thing, the prison doctor testified, without contradiction, that such a prisoner should have been segregated. For another, common sense suggests that including schizophrenics or pos-

sible psychopaths, along with others, in a dormitory where each prisoner has space equivalent to 30 by 74 *inches* (15.5 square feet) is a recipe for an explosion, which, given the other known conditions, could easily lead to someone's death. And, the circumstances of Arenas's death are consistent with his mental problems playing an incendiary role. Further, all three defendants were under court order to segregate "severely" mentally ill prisoners and to provide them with treatment, *Morales Feliciano*, 497 F. Supp. at 37-40, and the jury could have found from the psychiatric evaluations and the prison doctor's testimony that Arenas's mental illness was "severe" and that Torres knew (or should have known) this. He read the files the night of the transfer. He had the power to order more careful readings, more complete records (if psychiatric records were somehow missing), more thorough examinations, and, ultimately, to insist upon segregations. He did none of this. The risks of these "omissions" could have seemed to the jury serious enough and obvious enough to warrant a finding of "deliberate indifference."

The jury could have found "deliberate indifference" on the part of the defendant Nettleship in the same way. He was present the night of the transfer. The jury might have believed he read the files himself, or, if not, that he was fully aware of how they were being used. He was aware (from the court decree in *Morales Feliciano*) of the need to segregate and provide treatment for severely mentally ill prisoners and of the risks involved in failing to do so. Yet, he neither ordered segregation nor provided for a system that would achieve that result, and he approved Arenas's transfer to a jail that he, in all likelihood, knew provided no in-house mental health treatment.

As to Candelaria, the jury could have found that he had shown deliberate indifference to Arenas's mental health needs, a fact that in turn foreseeably increased significantly the risk of

death. They could have found that, as superintendent and chairman of the treatment and classification committee, he should have arranged for the speedy transfer of the prisoners' files and a determination, within a few days of the transfer, of which prisoners needed to be segregated and provided psychological treatment. Of course, Candelaria might not have had the authority to hire psychiatrists or to order treatment; he did have authority to read files, to assure their completeness, and to order segregation. Further, Candelaria, like the other defendants, was under court order to have every inmate screened by trained mental health staff. *Morales Feliciano*, 497 F. Supp. at 37-40. The only screening Arenas received was the preliminary one Candelaria conducted on the night of the transfer, apparently without any effort to determine whether the files then present contained psychiatric information showing a need for segregation. In light of *Morales Feliciano*'s specific reference to the constitutional inadequacy of having untrained prison staff conduct psychological evaluations, *id*. at 18, the jury might also have found Candelaria's reliance on his own layman's screening effort the night of the transfer sufficient to constitute "deliberate indifference."

The plaintiff argues that defendants were "deliberately indifferent" to the health and safety risks at Arecibo in other ways as well, but these suffice to uphold the verdict.

II.

The appellants argue that they enjoy a "qualified immunity" from paying damages in this case. They "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The relevant question "is the objective (albeit fact-specific) question whether a reason-

able... [official] could have believed" the omissions here at issue to have been "lawful in light of the clearly established law and the information" they then possessed. *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987). The defendants point to the fact that many of the cases holding officials liable for roughly comparable behavior are recent — post-1981 — and that, judged as of the standards in force in 1981, their conduct was "objectively legally reasonably." *Harlow*, 457 U.S. at 819.

Application of the "legally reasonable" standard is for the court, not the jury. In this instance, the court held that defendants were not entitled to qualified immunity. And we believe it was correct for the following reasons. First, as of mid-1981, it was well established that "deliberate indifference" to a prisoner's health and safety violated the Eighth Amendment. *See*, *e.g.*, *Estelle*, *supra*; *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981). In *Leonardo v. Moran*, we wrote that "prison officials have a duty under the 8th and 14th amendments to protect prisoners from violence at the hands of other prisoners." 618 F.2d 397, 398-99 (1st Cir. 1979). In *Layne*, we held that when "a supervisory official is placed on actual notice of a prisoner's need for physical protection or medical care, 'administrative negligence can rise to the level of deliberate indifference.' " 657 F.2d at 471 (quoting *West v. Rowe*, 448 F. Supp. 58, 60 (N.D. Ill. 1978)). We doubt that there is any significant difference between the "actual notice" of which *Layne* speaks, and the notice that prison conditions and the district court decree gave defendants in respect to the need to read the files or to have in place some procedures that would screen psychologically disturbed prisoners such as Arenas.

Second, as just mentioned, the defendants knew of the federal court decree finding the entire prison system unconstitutionally unsafe and medically deficient. The decree spelled out the need to determine which patients were severely

mentally ill and to segregate them and ensure them adequate treatment. The district court orders, several paragraphs of which emphasized the need for such segregation, had been in effect since 1979. Even if the defendants *thought* they did not violate the decree in so far as compliance involved matters beyond their control (*e.g.*, hiring more staff, obtaining increased appropriations), we do not see how they could have believed it lawful to violate the decree (in form or substance) in respect to matters that were *within* their control (*e.g.*, reading the files more carefully, making certain that past psychiatric records were in the files, reviewing them within a few days of transfer, providing segregated facilities for severely mentally ill inmates at Arecibo or a psychiatric hospital, or making certain that administrative systems were in place that achieved these ends).

Third, it is important to keep in mind that the word "unsafe" is inadequate to describe the *degree* to which Puerto Rico's prison system violated constitutional standards in 1981. To be specific, in 1981, 51 prisoners were killed by other inmates in Puerto Rico prisons out of a total prison population of approximately 4,000. By way of contrast, in the same time period in all the prison systems that responded to a survey conducted by the newsletter *Corrections Compendium*, (including 41 states and the federal system), out of a combined prison population of 263,000, 88 were murdered by other inmates. *See* 7 *Corrections Compendium* 1, 5-6 (March 1983); Bureau of Justice Statistics, U.S. Dept. of Justice, *Prisoners in State and Federal Institutions* (1982). Thus a prisoner in Puerto Rico in 1981 was approximately 40 times more likely to be murdered than a prisoner in the other penal institutions in the United States. Prison officials, working in these circumstances, understand that they are *not* liable for much of the harm that the system causes *only* because much of that harm involves matters beyond their individual control — appropria-

tions decisions, for example, are in the hands of the legislature. *Pinto*, *supra*. Yet that fact, in the context of an unconstitutionally dangerous system, should make reasonable officials increasingly sensitive to the need to avoid those acts or omissions, *within* their control, that might make matters worse.

In our view, at least the combination of these factors is sufficient to deny defendants qualified immunity under current legal standards, *see Anderson*, *supra*, and we therefore need not decide when, or whether, a jury finding of "deliberate indifference" is, in and of itself, inconsistent with qualified immunity. *Cf. Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984) ("a finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity"), *rev'd on other grounds*, 475 U.S. 312 (1986).

Of course, one might argue that, in the context of a seriously deficient prison system like this one, courts should be unusually reluctant to deny "qualified immunity" to officials who are actually working for constructive change, lest damage suits and the decisions of judges and juries, less knowledgeable about actual conditions, inadvertently interfere with conscientious efforts to achieve reform. In our view, however, if anything, the opposite is the case. The government of Puerto Rico has paid for defendants' litigation and will pay the damage judgment in a case like this. P.R. Laws Ann. tit. 32, §§ 3085-86 (1983). This indemnification by the state has the effect of transferring some of the human cost of the system, borne in the form of death and misery, to the public treasury, and thereby, perhaps, making the public more aware of those costs, and encouraging change. Regardless, we can find no reason for departing from strict application of legal standards here. Those standards, given defendants' knowledge of a seriously deficient system, a court decree, prior law, and the facts described in Part I that allow a finding of "deliberate

indifference," do not permit the assertion of a "qualified immunity" defense.

III.

Appellants argue that the district court erred in permitting the jury to consider the district court's decree in *Morales Feliciano*. To be more specific, the court instructed the jury as follows:

> The question is then, what is deliberate conduct, inaction or indifference in a case like the one you have been hearing for the last four days? I can only give you factors for you to consider so that you are assisted in your findings in this case.....
>
> The first factor that I think you should consider is that in the year 1979 this Court, in the case of Feliciano Morales versus Romero Barcelo found comprehensively that the entire prison system violated the Eight Amendment being overcrowded to the point that adequate supervision of inmates was very difficult.

The judge then read relevant excerpts from that opinion to the jury.

Since appellants did not object to the instruction at trial, we review it only to see if it amounted to 'plain error.' *See* Fed. R. Civ. P. 51; *Coy v. Simpson Marine Safety Equipment*, 787 F.2d 19, 25-26 (1st Cir. 1986). It did not. The decree was relevant in respect to liability, for reasons previously pointed out. It indicated what defendants might be expected to have known about the system and indicated the degree of importance they might be expected reasonably to have attached to the need to segregate mentally ill prisoners. At the same time, the court made clear that the jury should consider whether

defendants were in office too short a time to have been expected to address the decree's concerns. The district judge made clear that violation of the decree was not a *sufficient* basis for holding defendants liable. And he stressed (again without objection) that defendants were liable only for "deliberate and reckless disregard for life so as to make it deliberate conduct or inadequate regard or disregard to the safety of the prisoners." Given these added instructions, we can find no plain error.

IV.

We now turn to a subsidiary matter concerning damages. The plaintiff advanced two different claims against these defendants. She sued them (1) in the name of her son, whose claims for injury and death she inherited, and (2) in her own right for loss of familial association. The jury awarded her $247,000 without distinguishing between the two claims or indicating which damages belonged to which claim. Subsequently, in a different case, this court of appeals held that a parent cannot maintain a claim for loss of familial association under 42 U.S.C. § 1983 unless the government action in question is directly aimed at the relationship between a parent and young child. *Valdivieso Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1987). All parties concede that the decision in *Valdivieso* would require a new trial in respect to damages. The appellee argues, however, that we should apply the ruling in *Valdivieso* prospectively; that is to say, we should not apply it to the jury award here, which took place before the *Valdivieso* ruling.

We must, however, apply the law in effect when we hear the case, namely, *Valdivieso*, "unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974); *see Simpson v. Director, Office of*

Workers' Compensation Programs, United States Department of Labor, 681 F.2d. 81, 84-85 (1st Cir. 1982) (retroactive application of judicial decisions "is the rule, not the exception"); *see also Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) (listing factors court should consider in weighing prospective application). Here there is no statute or legislative history at issue. Nor is there "manifest injustice." *Valdivieso* did not represent a change in the law of this circuit. Although some other circuits had found a cause of action somewhat similar to the personal claim plaintiff sought to assert here, *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (recognizing parental right; rejecting right of sibling); *Trujillo v. Board of County Commissioners of the County of Santa Fe*, 768 F.2d 1186 (10th Cir. 1985) (recognizing right but only if alleged deprivation is intentional), this circuit had not done so; nor had it decided cases that suggested *Valdivieso* might have come out the other way. Indeed, perhaps recognizing this fact, the parties in this case originally arranged to ask the jury to separate damages when it gave its verdict. Fed. R. Civ. P. 49. But, for some reason, perhaps a slip-up, this was not done. Moreover, the "hardship" at issue here is a new trial, but only in respect to damages, and where (if the parties cannot settle the matter) the Commonwealth will likely have to pay the attorneys' fees of both sides. 42 U.S.C. § 1983 (1982). Were this sufficient to show "manifest injustice," the "prospective application" exception would swallow up the rule.

V.

Finally, appellants claim that the attorneys' fees awarded plaintiff's counsel are too high. They state that the $200 per hour used by the court to calculate the senior counsel's fee exceeds the rates previously allowed in this circuit. *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984). And they say that to increase the fee by 50 percent to reflect the risk of loss was not legally justified. In respect to the latter claim, the law is clear that an upward adjustment of fees to reflect risk is proper only in "exceptional" cases, *Blum v. Stenson*, 465 U.S. 886, 897 (1984), and when the court makes such an upward adjustment, it must, "at a minimum set forth in some detail the factors underlying its decision," *Conservation Law Foundation v. Secretary of Interior*, 790 F.2d 965, 970 (1st Cir. 1986); *see also Blum*, 465 U.S. at 901 (rejecting upward adjustment where district court failed to adequately justify its decision), answering questions such as the following:

1. what, if any, payment each attorney would have received had the suit not been successful;

2. what, if any, costs or expenses each attorney would have incurred if the case had been lost;

3. whether, after the successful verdict, [counsel] were completely dependent upon the court for their fees;

4. the length of time and number of hours the case consumed during which [counsel were] required to compensate [their] associates and carry [their] overhead expenses without assurance of compensation; and

5. whether other attorneys refused to take the case because of a risk of nonpayment.

Wildman v. Lerner Stores Corp., 771 F.2d 605, 61 (1st Cir. 1985).

The district court here gave no explanation of its 50 percent upward adjustment, or of its decision to award an hourly rate that exceeds significantly those we have previously viewed as 'top' awards. Our precedents require explanations of both. Consequently, the district court must re-examine its attorneys' fees determination.

The judgment of the district court is affirmed in respect to liability but vacated in respect to damages and attorneys' fees and the case is remanded for further proceedings consistent with this opinion.

EXHIBIT C
APPENDIX 20-25

The following order is entered as an emergency order for temporary and provisional relief. It is merely a stopgap to comply with what the defendants' expert stated were the goals of a prison system from a health standpoint. He said that the primary purpose was to prevent death; secondly, to prevent disease; thirdly, to prevent disability; then to prevent disruption of the Administration or flow of services; to prevent dissatisfaction among the inmates; and finally, to prevent discomfort. As the prison system in Puerto Rico now functions, it prevents none of these things. It is therefore,

ORDERED, that all "calabozos" or dungeons or isolation cells in each of the closed institutions operated by the Administration of Correction be and hereby are closed; and it is further

ORDERED, that no such similar cells shall be constructed or used in any facility operated by the Administration of Correction; and it is further

ORDERED, that all persons presently confined in a "calabozo" cell because they are mentally unfit and all persons presently confined in the unit known as Lower Maximum 1 (Máxima de Locos), at Bayamón Regional Institution, be forthwith transferred to psychiatric hospitals; and it is further

ORDERED, that all persons presently confined in the unit known as the "psychiatric module" of D-1-C Lower at the Bayamón Regional Institution or in the dormitories for the mentally ill at Aguadilla (Galera de Locos), or any other person confined in any other ward or any facility operated by the Administration of Correction and labeled as mentally unfit, be examined by a qualifed psychiatrist within ten (10) days from the date of this Order to determine whether said psychiatrist recommends treatment of such persons in a psychiatric hospital, or whether treatment can be continued under proper

psychiatric guidance within the penal institutions; and it is further

ORDERED, that henceforth and from the date of this Order, neither the Administrator of Correction nor any person operating as an employee, servant, agent or contracting party with the Administration of Correction, may place known psychotics or severely mentally ill persons in any isolation cell or in any other cell or dormitory or ward, without constant attention and medical care, and shall, if the medical conditions so warrant, transfer such inmate to a psychiatric hospital; and it is further

ORDERED, that not later than September 22, 1980, the defendants, or any of them, shall notify the Court that a full-time medical director has been appointed for not less than one year; and it is further

ORDERED, that if the defendants do not appoint a medical director within said time, the Court, as a provisional measure only, will appoint a medical director to serve until a full-time, permanent director is appointed by the defendants; and it is further

ORDERED, that the medical director appointed shall forthwith institute unified plans and procedures for the maintenance of medical records, standardize the contents of medical records and order that all information of a medical nature, including history, physical examination, laboratory tests and their results, X-rays and their results, diagnoses, doctors' orders, prescriptions and medications given, inter alia, be included in each such record; and it is further

ORDERED, that the medical director appointed shall be empowered to employ such staff of professionals, be they doctors, nurses, paramedics, psychiatrists, psychologists, psychiatric nurses, psychiatric social workers, dentists and dental hygienists as may be necessary to provide adequate medical care and attention to the entire penal population; and it is further

ORDERED, that within one week from his appointment, the medical director shall establish procedures for the medical screening of each incoming pretrial detainee or prisoner, which shall include a complete physical examination and such tests as may be necessary to diagnose tuberculosis, venereal disease, epilepsia, diabetes, chronic kidney disease, or any communicable disease; and it is further

ORDERED, that from the commencement of the screening of all incoming inmates, each inmate shall be screened medically and psychologically within one week from the date of his entry into the custody of the Administration of Correction of the Commonwealth of Puerto Rico; and it is further

ORDERED, that among the persons to be employed by the medical director shall be a psychiatrist who shall be in charge of the psychiatric care for emotionally and mentally disturbed inmates; and it is further

ORDERED, that the psychiatrist in charge employed by the medical director shall forthwith establish procedures for the psychiatric screening of all incoming inmates into the facilities operated by the Administration of Correction; and it is further

ORDERED, that those incoming inmates who require hospital treatment in a psychiatric institution shall be transferred thereto and that those incoming inmates who require intensive psychiatric treatment shall have such treatment provided as is necessary; and it is further

ORDERED, that the psychiatric screening of all incoming inmates shall commence within one week from the appointment of the psychiatrist in charge, whose appointment shall be made within one week of the appointment of the medical director; and it is further

ORDERED, that within two months from the date of this Order the medical director shall cause the entire existing population in the custody of the Administration of Correction to be

screened with a complete physical examination and psychiatric examination for the detection of any chronic disorder or any communicable disease; and it is further

ORDERED, that the screening of the entire population of the facilities operated by the Administration of Correction shall be completed within three months of the date it is commenced; and it is further

ORDERED, that the Administration of Correction shall provide to each incoming inmate, whether pretrial detainee or convicted person, soap, towels, toothpaste and toothbrush, commencing immediately; and it is further

ORDERED, that the Administration of Correction shall provide all presently confined pretrial detainees and convicted persons, soap, towels, toothpaste and toothbrush, and that such items shall be completely distributed within sixty (60) days from the date of this Order; and it is further

ORDERED, that all food handlers shall be required to have had a physical examination and tests for tuberculosis or venereal disease; and it is further

ORDERED, that such examination shall be provided to food handlers hereafter so that no food handler shall be more than six (6) months on job duty without such an examination; and it is further

ORDERED, that all food handlers be provided caps or hairnets for use while handling foods; and it is further

ORDERED, that the Administration of Correction shall immediately repair the plumbing and sewage system at the Bayamón Regional Institution; and it is further

ORDERED, that a report concerning said repairs shall be filed with this Court within one month from the date of this order; and it is further

ORDERED, that the Administrator of Correction shall, at the time of filing said report, also report on the repairs and modifications of the sanitary and sewage system of all other

closed institutions and any other steps taken to improve said conditions; and it is further

ORDERED, that the Administrator of Correction take the necessary steps to insure that each inmate, whether prisoner or pretrial detainee, be afforded no less than thirty five (35) square feet of living and sleeping space. This goal of 35 square feet per inmate shall be achieved in stages as necessary within six (6) months from the date of this order; and it is expressly provided that said space requirement of 35 square feet is a temporary measure only; and it is further

ORDERED, that plans shall be submitted within ninety (90) days from the date of this Order showing the steps the Administration of Correction is taking to provide no less than 70 square feet per individually celled inmate and 55 square feet for inmates housed in dormitories, provided that said space limitations be accompanied by detailed plans for time out of cells by the inmates in restricted dormitories; and it is further

ORDERED, that henceforth no inmate or pretrial detainee shall be denied any medication prescribed by a qualified physician, nor shall any inmate be denied a special diet prescribed by a qualified physician, unless said prescription is rescinded for medical reasons by the medical director appointed; and it is further

ORDERED, that the injunction ordered herein is considered to be a claim separate and apart from other claims, including those for costs and attorneys' fees within the context of Rule 54(b) of the Federal Rules of Civil Procedure.

There is no just reason for delay, and the Clerk of this Court is instructed to enter this Opinion and Order forthwith as a judgment so that this Order be made immediately appealable.

This Court shall maintain continuing jurisdiction over the enforcement of these Orders, and in order to permit the plain-

tiffs an opportunity to contest any report or statement filed by the Administration of Correction, it is

ORDERED, that the seven plaintiffs' attorneys who appeared at trial shall be permitted to enter into any of the institutions operated by the Administration of Correction and to confer with their clients and to inspect any of the conditions covered in this Order.

IT IS SO ORDERED.